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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 749

BEATTY SAFWAY SCAFFOLD CO.,
Petitioner,

vs.

UP-RIGHT, INC., a Corporation,
Respondent.

Petitioner's Reply Brief

HENRY GIFFORD HARDY
513 Mills Building
San Francisco 4, California
Attorney for Petitioner

SORG PRINTING COMPANY OF CALIFORNIA, 150 FIRST STREET, SAN FRANCISCO 5

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The attempt by Respondent to divert the fundamental questions of law, 1 and 2, raised in this Petition for Certiorari and to belittle them as mere disputed facts, is defeated for the following reasons:

A. Respondent admits (Brief, p. 4) that the record is silent as to the offer and admission into evidence of the unrecorded assignment upon which it bases its entire case and upon which the power of the Trial Court to enter a judgment is based. There is no disputed fact here as it stands admitted that the assignment is not in evidence.

B. The affidavit of Richard Davis, Deputy Clerk, (Respondent's Appendix A) admits that the list of exhibits which he

inserted with the record is "unofficial". Such an unauthorized act of a clerk in filing an "unofficial" list of exhibits cannot be countenanced as a substitute for the admission of a document in evidence because it usurps the judicial function. The absence of the unrecorded assignment as a part of the record stands admitted by the very presence of this affidavit.

C. This Court held as a matter of law in *The Lessor of Fisher v. Cockerell*, 5 Pet. (U.S.) 248; 8 L.Ed. 114 (1831), that the failure to place a proper document in evidence could not be remedied by the affidavit of a clerk, and held at page 254:

> "In cases at common law, the course of the court has been uniform not to consider any paper as part of the record which is not made so by the pleadings, or by some opinion of the court referring to it. This rule is common to all courts exercising appellate jurisdiction, according to the course of the common law. The appellate court cannot know what evidence was given to the jury unless it be spread on the record in proper legal manner. The unauthorized certificate of the clerk that any document was read, or any evidence given to the jury, *cannot make that document or that evidence a part of the record so as to bring it to the cognizance of this court.*" (Emphasis supplied.)*

Accordingly, as a matter of law, the unauthorized affidavit of a clerk does not make the missing proof a part of the present record.

D. The Trial Court itself stated (R. 179) that mere reference to an exhibit in the course of the trial does not mean that it is admitted in evidence.

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*This decision was followed by this Court for over fifty years. *The Lessee of Reed v. Marsh*, 13 Pet. (U.S.) 153; 10 L.Ed. 103 (1839); *Suydam v. Williamson*, 20 How. (U.S.) 427; 15 L.Ed. 978 (1857); *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall (U.S.) 592; 17 L.Ed. 638 (1863); *England v. Gebhardt*, 112 U.S. 502; 28 L.Ed. 811; 5 Sup. Ct. 287 (1884). There appears to be no reference to this line of cases in the last seventy-five years.

E. The reading of the assignment and the license by counsel for Petitioner does not make these documents a part of the record, especially since the Trial Court threatened that if they were used they would have to be offered in evidence by Petitioner (R. 175). If they had already been in evidence this would not have been necessary. Petitioner's counsel found no justification for or reason to offer Respondent's documents to prove Respondent's case.

F. Falling back to Respondent's secondary position, there is no dispute that the exclusive license was not offered in evidence. The fact is admitted that it was not (Brief, p. 7).

G. Calling a document an "exclusive license" does not make this a fact. Its provisions must be examined in order to establish the right of a licensee to sue in its own name under the doctrine of *Waterman v. Mackenzie*, 138 U.S. 252, 34 L.Ed. 923 (1891). It was held in that case (p. 256):

> "Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions."

H. If, as Respondent asserts, the agreements of the Pre-Trial Order are controlling, then the agreed fact that Johnson is the owner of the patent in suit (R. 17-18) is inconsistent with the claimed right of the licensee Up-Right, Inc., to sue in its own name alone, and the statement of ownership would prevail. There can be no dispute about this.

Questions 1 and 2 presented by the Petition are of fundamental concern to every litigant,—does the Trial Court have the power to enter a judgment, and does the Appellate Court also have the power to review such a judgment, when it admittedly appears that the documents upon which the jurisdiction and power are based, are not in evidence. The up-dating and reaffirmance with respect

to basic principles long taken for granted is of greatest interest to the public, especially when the same are challenged and overridden, as was done here.

It is respectfully urged that the Petition should be granted.

Respectfully submitted,

HENRY GIFFORD HARDY
Attorney for Petitioner

February 20, 1963
San Francisco, California